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Number 177.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

McGRAW ELECTRIC COMPANY, a Delaware Corporation, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee,

and

INTERSTATE COMMERCE COMMISSION, and THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.,
Intervening Appellees.

Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM.

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ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

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STATEMENT.

The two motions of appellees to affirm, filed under provisions of paragraph 3, Rule 12 of the Revised Rules of the Supreme Court of the United States, seek the dismissal of this appeal on the charge that the appeal presents no substantial questions.

The jurisdictional statement filed by the appellants, pursuant to Rule 12 of this Court, sets forth the principal issues involved upon which it is contended that the questions are substantial and of great public interest, and upon which we submit that this Court should note jurisdiction. There are some misconceptions of law and fact in the appellees' motions, and it is believed that the submission of this brief may be of assistance to the Court in the determination of the issues presented.

I.

When appellants consented to present the cause under "shortened procedure," they did not agree to a procedure lacking in due process and fairness.

Both motions of appellees seem to assume, where the cause was submitted to the Interstate Commerce Commission under "shortened procedure" and considered by both the Examiner and the Commission under that type of submission, that the appellants thereby waived whatever right they may have had to make oral argument before the Commission. The fallacy of that position is at once apparent. Almost every cause presented to the Commission, as this Court and the appellees know full well, is heard and reported upon initially by an Examiner designated by the Commission for that purpose.[1] Those rare instances where the Commission or one of its Divisions or individual Commissioners may hear a cause in its original stage are so rare that they may be discarded readily by this Court from consideration insofar as they affect the issues here. Almost all of the contested causes before the Commission

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[1] Sixty-seventh Annual Report of The Interstate Commerce Commission—1953, p. 92; Sixty-sixth Annual Report of The Interstate Commerce Commission—1952, p. 87. Tabulations of the character of proceedings before the Commission for the years 1949-1953, both inclusive, are charted therein.

are heard by it either upon "shortened procedure", i. e., documentary evidence, together with the Examiner's report thereon, and the exceptions thereto filed by the parties, or upon "modified procedure" where the proceeding is heard by an Examiner on written statements, oral evidence and exhibits, the report of the Examiner and the exceptions thereafter taken by the parties. In both types of procedures the cause comes before the Commission itself for hearing and determination upon a record, exceptions and briefs in comparable fashion to the presentation of a cause to this or any other appellate court.

There is nothing in the practice or rules of the Commission which indicate any other course. There would appear to be no reported rulings of either the Commission or the courts to sustain this position of appellees, if their contention is that appellants, by consenting to the "shortened procedure," waived their right to have oral argument before the same persons who would ultimately decide the case.

The appellee railroads maintain that there are certain "procedural facts which are conceded by appellants." Among the categories of such assumed facts are that all of the Commissioners who decided the case read the transcript of the oral argument, read the record, and considered the briefs and exceptions to the Examiner's report filed by the parties before it. Neither we nor the appellees have any actual knowledge as to these "facts" and cannot affirm or deny their verity. **We do know that of the three Commissioners who decided the cause only one was present at the oral argument and that he dissented from his non-hearing colleagues.** It is that circumstance upon which we predicate our contention that the procedure followed by the Commission did not accord the fair hearing required by the Due Process Clause of the Federal Constitution.

Further when the appellee railroads say that we concede that "at the time oral argument was heard, a quorum of the Division which decided the case was present," the statement can be characterized as casuistic and misleading. It is true that a quorum of the Division in which the case was lodged was present—but the issue of fair hearing in the case at bar hinges upon the **personnel** constituting the Division, and whether Due Process requires that the **personnel** of the Division who decide the case must be the same as those who heard the oral argument. On that issue the relevant and significant fact is that at the time oral argument was heard, **only one of the members** of the Division to which oral argument was presented actually participated in the decision and disposition of the case, and, even more importantly, **it was that member** who dissented from the decision of his fellow-adjucators who did not hear the oral argument. There was another member of the Division physically present at the time of oral argument, Commissioner Miller; he died prior to the time that decision was reached, and the opinion of the Division discloses affirmatively that Commissioner Miller did not participate in the order of the Division. In addition, the record discloses affirmatively that Commissioners Johnson and Patterson, who did not hear a word of the oral argument, wrote the opinion and orders of the Commission.

It is correct to state, as appellee railroads do, that there is no dispute upon the record procedural facts. The court below found properly that appellants, within the time and in the manner allowed by law and the Rules of the Commission (Rule 101), filed their objections to the manner in which the cause had been considered by the Commission and, as found by the court below, that "these matters were sufficiently raised during the administrative proceedings."

The appellees maintain that the action of the Commission in the respect complained of here received implied

approval of this Court in *Eastland Co. v. Federal Communications Commission* (Ct. of App., D. C., 1937), 92 F. 2d 467, certiorari denied, 302 U. S. 735. We referred to that decision in our jurisdictional statement. In the *Eastland* case three Commissioners of the Federal Communications Commission heard the oral testimony of the witnesses and oral argument. The Commissioners were Gary, Brown and Sykes, but the decision was rendered by Commissioners Sykes, Case and Paul. The Court of Appeals, in upholding the action of that Commission, based its decision upon the ground that the F. C. C. may, by its organic statute [47 U. S. C. A., § 409 (e)], grant a rehearing of any decision rendered by it where a motion is filed by an aggrieved party and that in the Eastland case no such motion had been filed. It was the failure of the appellants there to file such a motion that governed the disposition of that case, for the court pointed out, *supra*, 92 F. 2d 470-471:

> No motion, however, was made by appellants for a rehearing before the Division, nor before the Commission.

In the cause at bar such a motion was timely and properly made. The Eastland opinion is wholly inapposite here, except to the extent that the inference is clear that had a motion for rehearing been filed by the aggrieved party, the ruling of the court would have been the other way.

II.

The two-to-one decision where the two who decided did not hear oral argument, but the dissenter did, denies the full and fair hearing required by due process.

Appellants did not complain below or do they do so here that when Division 3 heard the exceptions to the Examiner's report only two Commissioners, Miller and

Cross, were present to hear the oral argument. Had these two Commissioners, constituting a quorum of the Division, finally determined the cause jointly, it is probable that appellants would have been precluded from a valid complaint on this score under the doctrine declared by Circuit Judge Augustus N. Hand in *Visceglia v. United States* (D. C., S. D., N. Y., 1938), 24 F. Supp. 355, 357.

The objection of appellants is based upon the record facts that at the time of the oral argument before Division 3, in Washington on October 19, 1949, Commissioners Miller and Cross were the only Commissioners who heard the oral argument; that Commissioner Miller died on December 24, 1949; that when Division 3 was re-constituted on January 5, 1950, to consist of Commissioners Patterson, Johnson and Cross, only eleven days later, and **before** appellants had a full opportunity to object to the order of re-constitution or to request re-argument before the newly constituted division, on January 16, 1950, Division 3 rendered its report, the majority opinion being written by Commissioners Patterson and Johnson, who were not present at the oral argument, with Commissioner Cross, who **did** hear the oral argument, dissenting in substantial part. As indicated, Division 3 was re-constituted without giving appellants or any of the parties the full opportunity provided in the Commission's rules to object or to request re-argument. The Commission made the order in Washington on January 5, 1950, and the parties were notified by ordinary mail, so that appellants had no actual knowledge of the order of re-constitution of the Division until January 7, 1950. Nine days later, on January 16, 1950, the opinion of Division 3 was rendered.

Rule 96[1] of the Commission provides that a party to a proceeding shall have twenty days after service of an

[1] Rule 96 (b). Within 20 days after service of the officer's report, any party may file and serve exceptions thereto and reasons in support thereof. (49 U. S. C. A., following par. 301.)

order of the Commission within which to file exceptions, and that the filing of such exceptions, Rule 97[2], operates to stay the effectiveness of the order. It is thus apparent that the time permitted by its own rules was not afforded by the Commission for appellants to except to the order of January 5, 1950, re-constituting the Commission or in the alternative to request re-argument before the members of the Division as reconstituted, including the two members who were not present at the oral argument.

Appellees attempt to persuade this Court, as they did the court below, that since the statutes give no absolute right to oral argument before the Commission, appellants may not properly appeal to the judicial conscience no matter how inadequate or unfair the proceedings were in this respect before the Commission. In this, they disregard the long history of this Court's perceptiveness as to the requirements of fair procedure in this field, as exemplified in *Interstate Commerce Commission v. Louisville & N. R. R. Co.* (1913), 227 U. S. 88, 91, wherein it is stated:

> In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; or if that granted was inadequate or manifestly unfair * * *.

A like expression of this Court is set forth in *Akron, C. & Y. R. Co. v. United States* (1923), 261 U. S. 184, 200, wherein it was said:

> A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from

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[2] The applicable part of Rule 97 is set forth in appellants' Statement as to Jurisdiction.

the standpoint of justice and law, the step to be taken.

The question of the right of the Commission to deny **any** oral argument to the parties herein is not an issue in this cause, and whether or not the right of appellants to present oral argument was merely a privilege, to be granted or withheld at will, is not a relevant consideration. Whether the Commission accorded oral argument because it recognized the importance of the substantive questions in the case or whether it did so to avoid a subsequent charge of procedural insufficiency is not disclosed by the record or important to the present issue. The fact is that the Commission, under its own rules, accorded appellants the opportunity for oral argument, and thereafter frustrated the effective exercise of that opportunity by entrusting the disposition of the cause to three members, two of whom did not hear, participate, or have the opportunity to participate in the oral argument. This was indeed a way of exalting shadow over substance.

The railroad appellees not only dispute the proposition that one who decides must actually hear the argument, but they contend in addition that if the opportunity for argument is vital to a fair hearing the necessity is met by entertaining written argument. This is indeed a constricted and provincial, if not a wholly unrealistic appraisal of the nature and function of oral argument. It presupposes that judges and administrators are constrained to sit as robots, listening but not participating, prohibited from the questions, comments or inter-play of minds of judges and counsel which are so crucial in stripping non-essentials and arriving at the quintessence. If those who are to decide do not "hear" in this sense, then the function of argument in judicial and administrative hearings over the centuries has been fruitless, if not a mockery. But the appellees' concept of argument is not

the rule in theory or practice. What lawyer has not heard appellate judges admonish the bar as to the vitality, importance, and usefulness of oral argument? What lawyer has not experienced the intellectual inquisition of an appellate court and not perceived its intense importance in the judicial process?

Surely, appellees' notion of a written argument as sufficing (even if the argument be carefully read) is not within the concept of what was said by Mr. Justice Jackson in *Land v. Dollar* (1951), 341 U. S. 737, 748, when he said:

> Even if the parties themselves are not strictly entitled to or do not want to argue this motion, I should require them to do so, for hearings are more important here for the benefit of the Court, as a protection against unwise decision than for benefit of the parties. It is the Court that is now on trial.

As we have previously made clear, appellants made timely and prompt objection to the denial of a full and fair hearing occasioned by the foregoing circumstances, and appellants did not keep their complaint as "an ace up the sleeve to be produced later" at a trial. *United States v. Bryan* (1950), 339 U. S. 323, 343-344.

It is understatement to say that the "traditional notions of fair play and substantial justice" referred to in *International Shoe Co. v. Washington* (1945), 326 U. S. 310, 316, were not observed by the Commission in this cause. The Interstate Commerce Commission is one of the oldest administrative agencies of our government. Its pattern has been followed as a model by many of the administrative agencies, both federal and state, which have been created in more recent years. The reported cases reveal no other instance in which the Commission has con-

ducted its business in the manner it adopted in the present proceeding.

The cause at bar presents a fundamental issue of fair administrative procedure which is of much interest and concern to the judiciary, to administrative agencies and to the bar throughout the nation. The failure of this Court to take jurisdiction of this cause and to require adherence to establish constitutional notions of procedural fairness will inevitably be taken as an imprimatur of laxity, if not caprice, in the administrative process. The natural momentum and tendency of such agencies as the Interstate Commerce Commission, which possess both policy-making and quasi-judicial functions, toward the confusion of those functions, with resultant injury to the subjects of their litigational jurisdiction requires an alert judiciary. This does not signify that judges should view such cases *de novo;* but the minimum task of judges is to determine that rudimentary fairness in procedure has been observed and that the agency has acted within its jurisdictional ambit. History has demonstrated that judicial inattention to these minimal standards is an invitation to administrative tyranny, if not anarchy.

The precise issue before the Court does not require the Court to determine that full opportunity for oral argument is an absolute prerequisite in all matters adjudicated by the Commission, or by other administrative agencies. Had the Commission refused any oral argument at any juncture while it possessed the case, that issue might well have been presented. Even under those circumstances—considering the significance of the substantive issues, which the Commission apparently regarded as justifying oral argument—this Court has forecast the possibility that procedural due process under appropriate circumstances may not stop short of the opportunity for oral argument. Thus in *Federal Communications Commission*

v. Station WJR (1949), 337 U. S. 276, upon which appellees place much reliance, Mr. Justice Rutledge said, l. c. 277:

> • • • we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument. That is not a matter, under our decisions, for broadside generalization and indiscriminate application. It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them. Only thus may the judgment of Congress, expressed pursuant to its power under the Constitution to devise both judicial and administrative procedures, be taken into account. Any other approach would be, in these respects, highly abstract, indeed largely in a vacuum.

When the substantive issues presented in the present case are measured by the foregoing standards, it is believed that this Court might well rule that nothing short of an opportunity for oral argument in such a situation would satisfy the requirements of due process. Certainly, if that be true, this Court's precedents show that a mere sham or pretense of oral argument, or, as here, the granting of oral argument in form but not in substance, would not delude the Court into believing its salutary standards had been met.

III.

The failure of the court below to give any consideration to the findings of the Examiner presents a substantial question.

Subsequent to the filing of the complaint in the cause at bar, this Court held in *United States v. L. A. Tucker Truck Lines, Inc.* (1952), 344 U. S. 33, that the requirements of the Administrative Procedure Act applied to Interstate Commerce Commission proceedings despite the vigorous protests of the Commission against its being subjected to the provisions of the Act.

The Administrative Procedure Act[1], and particularly Section 11[2], contains detailed provisions designed to assure and maintain the high standard of independence and competence of examiners. There is no reason to believe that the Examiner for the Commission in the present proceeding failed to measure up to the ideals which were the objective of the Act. Apart from our natural bias for the recommendations contained in his report, that report betokens the care, thoroughness and competence which he brought to the case.

Division 3 of the Commission, however, rejected the Examiner's report by a three to one vote, and the entire Commission sustained the Division by a six to four vote. The report of the Examiner was also before the court below, both as an exhibit to appellants' complaint and as a part of the evidence in the record before the Commission. There is nothing in the opinion or findings of the court below to indicate that any attention was there given to the report of the Examiner; on the contrary, it is apparent that the court below wholly ignored the lucid and cogent

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[1] 5 U. S. C. A., sec. 1001 et seq.

[2] 5 U. S. C. A., sec. 1011. The relevant portion of this section is printed in Appendix A to this brief.

product of the Examiner's labors in determining, without any mention of the Examiner's report, that the findings of the Commission were supported by substantial evidence. In this respect the court below wholly ignored this Court's injunction in *Universal Camera Corporation v. National Labor Relations Board* (1951), 340 U. S. 474, which would have required the court below—in determining whether there was substantial evidence to support the Commission's finding or order—to consider and to accord to the findings and report of the Examiner the relevance they reasonably command. In fact, it is impossible to ascertain from a reading of the opinion of the court below that it was even aware of the existence or relevance of the Examiner's report.

It is significant to note from the record that the proceedings were before the Examiner from April 15, 1948, until May 6, 1949 (as of which date he rendered his proposed report), approximately a year, whereas the reconstituted Division 3 of the Commission reversed the Examiner within but a few days after it was assigned to consider the cause. Promptness and dispatch are ordinarily virtues in the judicial process, but the relative disparity in the care and effort between the Examiner's role and that of Division 3 does not inspire confidence that a just result coincided with a hasty one. The court below kept the cause within the judicial bosom for a respectable period, but its opinion does not indicate more than a mere rubber-stamping approval of the Commission's determination, without the careful and searching scrutiny that might well be anticipated when the issues are large and portentous.

It cannot be gainsaid that important questions of public law inhere in the case at bar for, apart from the vital question of oral argument as an attribute of fair hearing and procedural due process, a failure to review this cause

will be construed as tacit approval of the complete relegation to administrative limbo of the hitherto important role of the Examiner. If the function and significance of the Examiner[1] is to be depreciated, both in the administrative process and in the area of judicial review, it ought not be done by inaudible evaporation, but rather by a considered and articulated appraisal. The report of the Examiner in the present case was an important document, and it has been incorporated as Appendix B to this brief. A reading of that report will indicate its substantial value to a court reviewing the action of the Commission, and will further indicate that if the court below had in fact given it any consideration the lower court's result, if the same result had been reached, would have been reached with much greater difficulty and diffidence.

IV.

The Substantive Issues.

We make no further comment here as to the importance of the substantive issues which are presented by this case. Their importance is fully presented in appellants' statement on the jurisdiction, which also reflects our view that the court below in perfunctorily assenting to the opinion and orders of the Commission gave lip-service and little more to its obligation of judicial review and the character of review of the record which litigants ought to receive. Although we have confined this brief to the procedural issues presented, that concentration should not be taken to minimize the importance of the substantive issues. We have emphasized the procedural issues herein because the erroneous decision of the court below on the matter of tariff classifications, if left undisturbed, will be scarcely

[1] An extensive discussion on "The Status of the Trial Examiner in Administrative Agencies" is set forth in Vol. 66, Number 6, *Harvard Law Review* (April, 1953) 1065-1081.

more than an expensive and painful injustice to appellants and perhaps to others similarly situated.

The reverse, however, will be true if the Commission is not called to account with respect to its violation of the rules of fair administrative procedure, and more particularly with respect to the action by which it frustrated the appellants' right to argue the cause before those who were ultimately to decide it. Such procedure wholly inconsistent with any instinct or constitutional demand for fairness may—unless promptly inhibited by this Court—become a pernicious pattern, indeed a cancerous growth which will become more difficult to excise on a later day.

To emphasize thus a matter of procedure is not to exalt a choice of method or form over substance. The matter of procedure is important here because: (1) it is a matter of **fair** and constitutionally-required procedure, and (2) a sound and just disposition of this cause before the Commission may well have turned on the application of a sound and just method of procedure.

CONCLUSION.

We respectfully submit that this Court should enter its order noting probable jurisdiction of this cause so that the vital, important and substantial issues presented may be thoroughly explored and authoritatively determined. We are confident that upon an examination of the entire record by this Court, the decree of the court below will be reversed and the cause remanded.

In noting probable jurisdiction here, this Court will fulfill the profound observation of Mr. Justice Douglas in *United States v. Wunderlich* (1951), 342 U. S. 98, 101:

> Law has reached its finest moments when it has freed man from the unlimited discretion of

some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times his privacy; at times his liberty of movement; at times his freedom of thought; at times his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

Respectfully submitted,

ARTHUR J. FREUND,
Attorney for Appellants.

June 10, 1954.

APPENDIX A.

5 U. S. C. A., § 1011. *Administrative Procedure Act.*

Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute, or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof is held invalid, the remainder of this chapter or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly.

APPENDIX B.

INTERSTATE COMMERCE COMMISSION.

No. 29962.[1]

Bussmann Manufacturing Company Division of McGraw Electric Company et al.

v.

Akron, Canton & Youngstown Railroad Company et al.

1. Rates and ratings on fuse plugs found applicable on plug fuses.

2. Electrical fuses found not to be parts of electrical appliances. Defendant's failure to apply on shipments of fuses rates and ratings applicable to electrical appliances and parts not shown to be or to have been violative of the act.

3. Assailed rates and ratings on fuses, noibn, found to have been and to be unreasonable.

4. Proposed change in classification description of fuse plugs found just and reasonable. Suspension order vacated and proceeding discontinued.

William E. Rosenbaum for complainants.

Leo P. Day and Edward R. Gustafson for defendants.

REPORT PROPOSED BY CHARLES MANOOGIAN, EXAMINER.

The shortened procedure was followed.

By complaint filed April 15, 1948, complainants allege that the rates and charges on various types of fuses

[1] This report also embraces Investigation and Suspension Docket No. 5609, Classification Description—Electric Fuse Plugs, which by agreement will be decided on a common record with the title proceeding.

shipped in interstate commerce from Bellwood and Chicago, Ill., Milwaukee, Wis., and St. Louis, Mo., to destinations listed in Agent B. T. Jones' tariffs, I. C. C. Nos. 2447, 2448, 3425, and 3642, and in Agent R. G. Raasch's tariff, I. C. C. No. 563, were, are, and for the future will be unjust and unreasonable, unjustly discriminatory, and inapplicable in violation of sections 1, 2 and 6 of the Interstate Commerce Act. The Commission is asked to order defendants to cease and desist from continuing the alleged violations, to determine and establish lawful rates for the future, and to award reparation on shipments made during the statutory period and on shipments made pendente lite. [No. 29962, Sheet 2] Each complainant manufactures, sells, and ships in interstate commerce various types of electric fuses. Bussmann Manufacturing Company Division of McGraw Electric Company is a Delaware corporation with its principal office at Elgin, Ill., and an office and plant at St. Louis. Economy Fuse and Manufacturing Company is an Illinois corporation with its principal office and plant at Chicago. Jefferson Electric Company is also an Illinois corporation with its principal office and plant at Bellwood. Trico Fuse Manufacturing Company is a Wisconsin corporation with its principal office and plant at Milwaukee. When not referred to collectively as complainants, the individual firms will be referred to hereinafter as Bussmann, Economy, Jefferson, and Trico, respectively.

Allegations embodied in the complaint herein fall into three categories. They are:

1. That defendants' failure to accord to less-carload shipments of commodities described by complainants as plug fuses the column[2] 70 exception ratings applicable on fuse plugs results in rates and charges on plug fuses that

[2] The word "column" or "class" followed by a number indicates a corresponding percentage of first class.

are inapplicable, unreasonable, and unjustly discriminatory.

2. That defendants' failure to apply on complainants' less-carload shipments of fuses, noibn, the column 70 exception ratings applicable on electrical appliances and parts results in rates and ratings that were, are, and for the future will be inapplicable, unreasonable, and unjustly discriminatory.

3. That the application of first class ratings and rates on complainants' less-carload shipments of fuses, noibn, is unjust and unreasonable to the extent that such ratings and rates exceed the column 70 exception ratings available for shipments of fuse plugs.

Plug Fuses.

A substantial portion of complainants' testimony in this proceeding is directed to the failure of defendants to apply to shipments of plug fuses the ratings which have been published to apply on fuse plugs. Complainants argue that the use of the two terms interchangeably gives rise to confusion among shippers and consignees that can and often does result in the payment of incorrect charges. Defendants' witnesses testified, and defendants agree, that fuse plugs are plug fuses, and equally so conversely. In electrical circles no distinction is drawn in the use of the terms and none should be made in the application of carriers' tariffs.

It is apparent from the testimony of record that the terms are used synonymously to describe one and the same type of commodity, namely, a fuse which is screwed into a receptacle in the manner of an electric bulb. It may be said then that rates or ratings applicable to shipments made on one description are equally applicable to shipments made on the other description. Where that has not been done during the period and between the parties in-

volved herein, proper adjustments in the freight bills should be made. In view of the find- [No. 29962, Sheet 3] ing of applicability set forth above, no findings are necessary under other sections of the act.

Fuses as Parts of Electrical Appliances.

Complainants' second allegation is concerned with the failure of defendants to apply to shipments of fuses the column 70 rating applicable to certain types of electrical appliances and parts thereof. It is complainants' contention that fuses are integral parts of electrical appliances and therefore must be treated as such in determining the rates or ratings to be applied.

Defendants do not dispute the applicability of the item to parts of electrical appliances but deny that fuses shipped by themselves are parts of electrical appliances as contemplated by the item. They argue, and properly so, that fuses are susceptible of use in any part of an electrical circuit at any point at which the electrical power first becomes available to and including the point of final use of the power, which can be, of course, in the electrically driven machine itself. Furthermore, there are few, if any, fuses manufactured for use exclusively at any particular point in the circuit or with any particular type of machinery. Fuses of various types can be and are used interchangeably with one another in addition to being used at any point in the circuit most convenient or proper for the purpose intended.

There is nothing peculiar or singular in the construction or use of a fuse to take it out of its own category and place it with parts of electrical appliances. It must be admitted, of course, that a fuse may be considered to be a part of an electrical appliance when shipped with and as part of an appliance. However, that is not the case here. These complainants manufacture fuses and ship them in quantity as fuses. They will eventually find their way

into the hands of individuals who by the very nature of the articles may use them at any point desired in the circuit.

It is apparent then that these fuses, protective devices that they are, are in themselves electrical appliances conceived and manufactured to serve a particular purpose, i. e., the protection of the circuit, the machinery or appliance involved, or both. They operate independently of the machine which they may be expected to protect, just as the machinery operates independently of them until an over-current occurs.

The Commission should find that the assailed failure to treat and rate fuses as parts of electrical appliances has not been shown to be an unlawful practice, violative of the act.

Reasonableness of first-class rating on fuses, noibn.

Complainants' third allegation is that the application of first-class rates to fuses, noibn, moving in less-carload quantities in official territory is unjust and unreasonable to the extent that resulting rates and charges exceed those based on the column 70 exception rating on fuse plugs and electrical appliances and parts.

[No. 29962, Sheet 4] The various types of fuses or protective devices fall within one or the other of two descriptions found in the consolidated classification:

Electrical Appliances or Equipment, or Parts Named.

* * *

15890	Electrical * * * fuse plugs, noibn, in barrels or boxes.	2	30,000	R26-5-4
15965	Fuses, noibn, in barrels or boxes	1	30,000	3

The two classification entries denote the distinction which can be made for these purposes in the types of fuses

to be considered. Item 15890 applies to those fuses which are of the plug variety. They are those having screw plugs or bases, commonly known as the Edison shell or screw, which is screwed into the fuse socket or receptacle to complete the electrical circuit while providing protection. The Edison screw shell is of the same size and type as the base of the ordinary electric light bulb and fits into its socket in the same manner as do the bulbs. However, the item itself is broad enough, since it makes no use of the limiting word "Edison", to allow fuses having screw shell or bases of other sizes, which demand adapters before they can be used in the ordinary fuse socket, to be shipped under those ratings. Item 15965 applies to all other types of fuses manufactured by complainants, such as the cartridge and knife-blade varieties.

Item 4640 of Agent B. T. Jones' tariff, I. C. C. No. 3926, and item 3917 of Agent R. G. Raasch's tariff, I. C. C. No. 590, both provide exception ratings of class 70 on fuse plugs moving in or between specified territories. Similarly, item 6875 of Agent Jones' I. C. C. No. 3926 and items 3915 and 3915-A of Agent Raasch's I. C. C. No. 590, all provide column 70 ratings on less-carload shipments of certain electrical appliances and parts thereof. Among the appliances listed by name in these items are capacitors, controllers, motors, and switches. However, in the case of the latter three items fuses as such are not named.

As shown above fuses, noibn, are classified first class less-carload and third class, minimum 30,000 pounds, carload in all three major classification territories. At the same time fuse plugs (plug fuses) have been accorded a second-class rating less-carload and carload ratings of R26, fifth class, and fourth class, minimum 30,000. The carload ratings, when transposed into percentages of first class, mean that fuse plugs are classified as taking rates 55, 45, and 55 percent of first class in official, southern, and western classification territories, respectively, when

movements are made in those territories on the normal class-rate basis.

The normal class-rate basis, as distinguished from the exception-ratings or commodity-rate basis, is not used on less-carload shipments of fuses, noibn, in any classification territory other than official. Each of the other two major classification territories, southern and western, have exception ratings which have removed the application of the normal class-rate basis. Class 70 ratings are available on fuses, noibn, less-carload, from to and between points in the South and [No. 29962, Sheet 5] Southwest as well as in western trunk-line territory east of the Missouri River. Class 70 ratings also are available on less-carload shipments made from southern to official territory or from the latter area to the South and Southwest. Stated succinctly, fuses, noibn, move at first-class rates, less-carload, in official territory while enjoying exception ratings of column 70 in or to other territories. Thus the rates from certain official territory points are higher to other official territory points than to more distant points in other territorities although the official territory destinations are intermediate to the latter points.

In official territory defendants have provided an exception rating of column 70 on an extensive list of electrical appliances and parts, but singularly enough have failed to include fuses, noibn, in the list, although they have been included in the list of electrical appliances or parts which have been given an exception rating of column 40 in carloads. It might be said in this connection that the column 40 ratings for carload shipments of electrical appliances and parts is substantially lower than that available for similar shipments in the other territorities.

Defendants maintain first-class rates on shipments of fuses, noibn, less-carload, in official territory and at the same time provide column 70 exception ratings in the other

territories on similar shipments, in spite of the fact that carload shipments of fuses, electrical appliances, and parts in official territory are carried at column 40 ratings which in some instances are higher than that charged for similar shipments in other territories.

The assailed first-class rating on fuses, noibn, was appealed to the carriers' classification committee by complainants. The Auxiliary Committee of that organization recommended favorably that fuses, noibn, be added to the list of electrical appliances and parts permitted the column 70 exception rating less-carload. In spite of the recommendation of its auxiliary group, the carriers' classification committee refused to add fuses, noibn, to the list. It was after this refusal that complainants filed the instant complaint.

Witnesses for each of the complainants testified that less-carload shipments of fuses, noibn, were made in substantial quantities by all complainants. The fuses themselves are manufactured in a manner which removes the danger of damage in transit and are packed in a manner which lends itself to expeditious and safe handling. For instance, Bussmann shipped about 5 million pounds of fuses by truck and rail during the statutory period and only filed claims for damaged shipments in the amount of $28. Economy shipped about one-half million pounds in the same period and filed claims totaling less than $100 for loss and damage. Jefferson, without indicating volume of movement, showed that its claims totaled less than $750, while Trico, with shipments totaling 248,000 pounds in 2 years, had not filed any loss and damage claims.

The weighted averages of fuses shipped by complainants vary considerably. Shipments of fuses, noibn, made by Bussmann averaged 49 to 62 pounds per cubic foot, with values ranging [No. 29962, Sheet 6] from 76 cents to $2

per pound, compared to a density of 53.5 pounds per cubic foot and a value of 37 cents a pound for shipments of fuse plugs by the same company. Economy averaged $1.24 to $2.92 in pound-value and 44 to 63 pounds in weight per cubic foot for shipments of fuses, noibn, while averaging 62 cents per pound and 32 pounds per cubic foot for fuse plugs. Jefferson's averages were $2.64 per pound and 56.3 pounds per cubic foot; its fuse plugs were 63 cents per pound and 32.6 pounds to a cubic foot. Trico, with 55 to 65 pounds to a cubic foot and values of 90 cents to $1.10 per pound for fuses, noibn, shipped fuse plugs at 45 pounds to a cubic foot at an average value of 55 cents per pound.

The average price-list value for fuses manufactured and shipped by Bussmann ran from 67.6 to 88.2 cents for fuse plugs in lots of 100, while its fuses, noibn, averaged from $1 to $5. All of Trico's fuses averaged $1 to $1.98, Jefferson's averaged $2 to $7.27, and Economy's averaged $3.14 to $6.40.

The Commission should find that the assailed less-carload ratings and resultant rates on fuses, noibn, moving in official territory were unreasonable to the extent that such ratings and resultant rates exceeded those contemporaneously applicable on fuse plugs and that they are and for the future will be unreasonable to the extent that they exceed or may exceed those presently applicable on fuse plugs. The Commission should further find that complainants made shipments as described and paid or bore the transportation charges thereon; that they were damaged thereby, and are entitled to reparation, with interest, in the amount of the difference between the charges collected and those that would have accrued under the rates herein found to have been reasonable. Complainants should comply with rule 100 of the Commission's General Rules of Practice.

I. & S. Docket No. 5609.

By schedule filed to become effective November 5, 1948, respondents proposed certain changes in the wording of item 15890 of the Consolidated Freight Classification No. 18. Upon protest of the complainants in the title proceeding, hereinafter referred to as protestants, operation of the proposed classification item was suspended by the Commission to and including June 4, 1949.

Protestants are manufacturers and shippers of various types of electrical fuses which are embraced within one or the other of two classification items covering electrical fuses by name. Item 15890 provides ratings on electrical fuse plugs, among other things, and makes no other refinements in its description than is contemplated by the word "plug"; item 15965 provides ratings for fuses, noibn.

Item 15890 classifies that type of fuse which is made with a screw base or shell and screws into a fuse receptacle in the same manner as an electric light bulb screws into its socket. The classification description provided by item 15965 embraces all other types of electrical fuses such as the cartridge type and the knife-blade type. [No. 29962, Sheet 7] There are two principal types of fuse shells or fuse bases used in the manufacture of fuse plugs. One size, known as the Edison screw shell (or base), is the more common type. It is generally manufactured of brass and has the same construction and size as the brass shell found on the common household electric bulb. The other type of base used in fuse plugs is known generally as the Type S base. It is smaller than the Edison shell in diameter and therefore cannot be used in a fuse receptacle made for the Edison-sized fuse plugs without the use of an inexpensive adapter which fits into the fuse receptacle and diminishes the size of the receptacle to the size of the type S fuse.

As item 15890 of the classification now reads any plug, or screw-in, type of fuse may be shipped as a fuse plug, sometimes termed in the trade as a plug fuse. In the principal proceeding it was freely admitted by respondents that the terms fuse plugs and plug fuses were often used interchangeably and that the size of the shell had no effect on the application of item 15890. Respondents' proposed change in item 15890 would substitute for the words "electric fuse plugs" the phrase "screw shell type fuse plugs."

In spite of respondents' admission that the size or composition of a screw shell, or base, does not remove a plug-type fuse from being classified as a fuse plug, protestants contend that the proposed description will not apply on Type S fuses. Under protestants' construction of the proposed description such fuses would be automatically classified at the higher ratings published for fuses, noibn.

Protestants' contention has no basis in fact. There is nothing in the consolidated classification nor in the proposed change to limit the meaning of the words "screw shell" so as to include only metallic Edison plugs. Similarly, in both electrical and transportation circles, no distinction is made by virtue of size or composition of plug. The record is convincing that the expression "screw shell type fuse plugs" was intended to, and does, embrace all screw-in plug types of fuses.

The Commission should find that the proposed change embodied in item 15890-A, supplement 4, of the consolidated classification is just and reasonable. An order should be entered vacating the suspension order and discontinuing the investigation and suspension proceeding.